

[2023 LiveLaw \(SC\) 872](#)

**IN THE SUPREME COURT OF INDIA**  
**B.V. NAGARATHNA; J., UJJAL BHUYAN; J.**  
**WRIT PETITION(S)(CIVIL) NO(S).756/2022; 09-10-2023**  
**ARUN MUTHUVEL *versus* UNION OF INDIA & ORS.**

**Surrogacy (Regulation) Act, 2021; Section 2(1)(zg) - Surrogacy (Regulation) Rules, 2022; Rule 7 and 14(a) - Insisting that donor egg cannot be used for gestational surrogacy is *prima facie* against surrogacy rules.**

*For Petitioner(s) Mr. Mayank Pandey, AOR Mr. Sanjay Jain, Sr. Adv. Mr. Nalin Tripathi, Adv. Mr. Yuvraj Sharma, Adv. Mr. Nishant Tripathi, Adv. Ms. Harshita Sukhija, Adv. Mr. Mrinmai Sagar, Adv. Ms. Neelam Singh, AOR Mr. Amit Pawan, Adv. Mr. Akshat Srivastava, AOR Mr. Abhay Pratap Singh, Adv. Ms. Mohini Priya, AOR Mr. Malak Manish Bhatt, AOR*

*For Respondent(s) Ms. Aishwarya Bhati, A.S.G. Mr. Gurmeet Singh Makker, AOR Mr. Rajat Nair, Adv. Mr. Ketan Paul, Adv. Mr. Mayank Pandey, Adv. Ms. Chitrangda Rashtravara, Adv. Ms. Ameyavikrama Thanvi, AOR Mr. Ivan, AOR*

**ORDER**

This interim order concerns the petitioners/applicants in W.P(C)No.830/2023 aged about 38 years; I.A.No.138689/2023 in W.P.(C) No.487/2023 aged about 30 years; I.A.No.191808/2023 in W.P.(C) No.487/2023 aged 30 years; I.A.No.205941/2022 in W.P(C)No.756/2022 aged 28 years and applicant in I.A.No.78519/2023 in W.P(C)No.756/2022 aged 26 years.

This is having regard to the nature of the interim order we are passing in these matters which concerns only the petitioners who are stated to be having Mayer-Rokitansky-Kuster-Hauser (MRKH) syndrome.

For the sake of convenience, the prayers sought for by the petitioner ABC in W.P(C)No.830/2023 are extracted as under:

- A. Issue an appropriate writ/order/direction, to strike down GSR 179 (E) dt. 14.03.2023 being contrary to the objects and reasons of the statute and thus being contrary to the enactment itself.
- B. Hold that GSR 179 (E) dt. 14.03.2023 under no circumstances could be applied retrospectively.
- C. Issue a Writ in the nature of Mandamus or any other appropriate writ, order, direction directing the respondents to exempt the Petitioner and other similarly placed person from undergoing surrogacy procedure, who have already frozen their embryos/have started the procedure for surrogacy in terms of the Surrogacy (Regulations) Act, 2021, prior to 14.03.2023.
- D. Pass such further order(s)/directions(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and the interest of justice."

In the writ petitions or applications they have filed, it is stated that the petitioners, being married women, have a congenital disorder which is known as Mayer-Rokitansky-Kuster-Hauser (MRKH) syndrome, also referred to as Müllerian aplasia, characterized by aplasia of the uterus and upper part of the vagina of the female with normal secondary sex characteristics and a normal female karyotype (46, XX). It is a condition which is stated to affect the reproductive system of the female and is caused by abnormal development of the Müllerian ducts which are structures in the embryo that develop into uterus, fallopian tubes, cervix and the upper part of the vagina. It is stated that the MRKH syndrome involves absolute uterine factor infertility and the only option for the persons with such disability to achieve biological motherhood is through gestational surrogacy. The other option is uterus transplantation which is an impossibility in many cases.

Since the petitioners/applicants seek to achieve motherhood through gestational surrogacy within the legal framework in India, they have filed these writ petitions/applications seeking to assail substitution of paragraph 1(d) in Form 2 which is the Consent of the Surrogate Mother and Agreement for Surrogacy read with Rule 7 of the Surrogacy (Regulation) Rules, 2022 made under the Surrogacy (Regulation) Act, 2021 (hereinafter referred to as the “Surrogacy Rules” and the “Surrogacy Act”, respectively for the sake of brevity).

For immediate reference, Rule 14(a) of the Surrogacy Rules and Rule 7 read with Form 2 which read as under could be extracted insofar as the relevant portions are concerned:

7. Consent of a surrogate mother. - The consent of a surrogate mother shall be as specified in Form 2.

X X X

“14. Medical indications necessitating gestational surrogacy.- A woman may opt for surrogacy if; (a) She has no uterus or missing uterus or abnormal uterus (like hypoplastic uterus or intrauterine adhesions or thin endometrium or small unicornuate uterus, T-shaped uterus) or if the uterus is surgically removed due to any medical condition such as gynecological cancer;”

X X X

“FORM 2

[See rule 7]

Consent of the Surrogate Mother and  
Agreement for Surrogacy

1. That I understand that the methods of treatment may include:

a).....

b).....

c).....

d) the fertilisation of a donor oocytes by the sperm of the husband.”

However, by the impugned notification dated 14.03.2023, the aforesaid paragraph 1(d) has been substituted as under:

(d) (I) Couple undergoing Surrogacy must have both gamete from the intending couple and donor gametes is not allowed.

(II) Single woman (widow/divorcee) undergoing Surrogacy must use self eggs and donor sperms to avail surrogacy procedure.

As a result, the petitioner/applicants who are stated to be incapable of producing oocytes owing to MRKH syndrome are unable to avail of gestational surrogacy although under Rule 14(a), they are eligible for gestational surrogacy. In other words, while the contribution of the husband through his sperms is possible, owing to MRKH syndrome the wife of the intending couple i.e. the petitioner, ABC and the applicants are not able to produce any oocytes. Therefore, the intending couple who are the petitioners/applicants herein, despite having complied with all other conditions, owing to the amendment made to Form 2 which has, in fact, to be signed by the potential surrogate mother cannot achieve biological motherhood through gestational surrogacy. Therefore, the said amendment is assailed in this writ petition and consequential prayers are sought by the

petitioners/applicants who are an intending couple within the meaning of Section 2 (r) of the Surrogacy Act.

Learned senior counsel, Sri Sanjay Jain, appearing for the petitioner and learned counsel appearing for the other petitioners/applicants submitted that the substitution of paragraph 1(d) has taken place with effect from 14.03.2023. However, the procedures for achieving motherhood through surrogacy had commenced much prior to that and therefore the insertion of the substituted paragraph 1(d) has now impeded the process of the intending couples to achieve gestational surrogacy. They contended that the substituted paragraph 1(d) may be read prospectively and not applied to the petitioners/applicants in a retrospective manner.

It was also contended that the substitution of paragraph 1(d) in Form 2 is contrary to what is stated in Rule 14(a) of the Surrogacy Rules which recognizes the absence of the uterus which is caused by the MRKH syndrome, which is a disability and which is a justification for gestational surrogacy. It was submitted that under the circumstances, the reliefs sought for by the petitioners/applicants may be granted.

Per contra, learned ASG appearing for the Union of India took us through the various provisions of Act and the Rules and in particular Section 2(1)(zg) to contend that object of the Act is to nip the exploitation of women through the practice of surrogacy and therefore, the intention of the Parliament must be given effect to. That if, for any reason there is a bar for donation of oocytes, then the same has to be respected as the oocytes and the sperms of the intending couples only have to be made use of for achieving gestational surrogacy, otherwise the only other option they have is to adopt a child.

Learned ASG submitted that there is no merit in these writ petitions as well as the applications and therefore, the same may be dismissed.

We have considered the aforesaid submissions with all seriousness. Having regard to the challenge made to paragraph 1(d) in Form 2 namely, the substitution as referred to above, we find, *prima facie*, that this is a case where the said substitution is contrary to what is stipulated in Rule 14(a) of the Surrogacy Rules.

However, before we proceed further in the matters, we think it is necessary to seek a medical opinion from the concerned District Medical Board in order to seek a certification as to whether the petitioners/applicants are in a position to produce oocytes or not, having regard to the diagnosis of the MRKH syndrome in them.

Hence, the petitioners/applicants shall be present before the concerned District Medical Board on 11.10.2023 so as to be examined and a Report shall be submitted in a sealed cover to this Court so as maintain the right of privacy of the petitioners/applicants and confidentiality in the matter.

The said report shall be submitted on or before 16.10.2023.

On receipt of the report from the Board, the Registry of this Court to put up the same before the Court.

List these matters on 17.10.2023.